STATE OF MICHIGAN

COURT OF APPEALS

GERALD MASON and KAREN MASON,

Plaintiffs-Appellees,

v

CITY OF MENOMINEE,

Defendant-Appellant.

UNPUBLISHED
September 12, 2006

No. 262743
Menominee Circuit Court
LC No. 02-010066-CH

Before: Sawyer, P.J., and Kelly and Davis, JJ.

DAVIS, J. (*dissenting*).

I respectfully dissent.

I do not disagree with the majority's conclusion that the conveyance of the Water Tower Park property to defendant granted defendant fee simple ownership thereof. In that respect, I concur with the majority. However, I would therefore affirm – albeit on alternative grounds – the trial court's result granting title of the driveway to plaintiffs.

The evidence below showed that the driveway has been in the same location since 1958 or 1959 when it was constructed along with plaintiffs' house. Since that time, all of the owners of plaintiffs' property, several neighbors, and defendant all acted as if the driveway belonged to the then-owner of plaintiffs' property, not to defendant. Defendant constructed and maintained fences along the boundary between the driveway and the Water Tower Park, maintained only property on the Water Tower Park side of the fence, and apparently even planted pine trees "just inside the fence." Defendant never asserted ownership of the land under the driveway. A former street commissioner testified that defendant did not intend to establish a boundary line by erecting the fence, but did intend to ensure that only the then-owners of plaintiffs' property could use it and the public would not. Further, the right-of-way parcel now cannot be developed into a roadway without destroying the baseball diamonds defendant created on the Water Tower Park property.

I perceive not an abandonment but an acquiescence. I believe there is no possibility of a serious dispute that "the evidence demonstrates that the parties 'treated' the [fence] line as the approximate boundary line." *Walters v Snyder*, 239 Mich App 453, 458; 608 NW2d 97 (2000). The standard of proof is mere preponderance of the evidence, which is "less stringent than the clear and cogent evidence standard used in adverse possession and prescriptive easement cases." *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). There is no requirement

that the boundary line actually be disputed or that the possession be hostile or without permission. *Walters*, *supra* at 456. The parties and their predecessors treated the fence line as if it was the true property line continuously for at least fifteen years. *Id*.; *Killips*, *supra* at 260; MCL 600.5801(4).

Because the evidence shows that the parties treated the fence line as the true boundary between plaintiffs' property and defendant's property, I would affirm the result the trial court reached on the basis of the doctrine of acquiescence.

/s/ Alton T. Davis